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In the Supreme Court

of the United States

OCTOBER TERM 1975

No. 75-110

BERNARD A. SAKRAIDA,

Petitioner,

v.

AG PRO, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinions of the district court are not reported. The opinions of the Court of Appeals for the Fifth Circuit are reported as follows:

437 F.2d 99 (Feb. 1, 1971)—summary judgment
474 F.2d 167 (Feb. 5, 1973)—merits of the patent
481 F.2d 668 (June 25, 1973)—motion for new trial
512 F.2d 141 (April 24, 1975)—newly discovered evidence

QUESTIONS PRESENTED

1. Was the Court of Appeals correct in deciding that the evidence before the district court at the trial on the merits failed to overcome the statutory presumption of validity and that the Gribble and Bennett patent met the statutory requirements of validity, as well as the tests of patentability set forth by this Court?

2. Did the district court have jurisdiction to hear Sakraida's Rule 60(b)(2) motion for a new trial based on allegedly newly discovered evidence?

3. If the district court had jurisdiction to hear the Rule 60(b)(2) motion,

(a) did Sakraida meet the requirements of a Rule 60(b)(2) motion?

(b) would the allegedly newly discovered evidence have changed the outcome of the case?

(c) did the district court erroneously receive in evidence the allegedly newly discovered evidence?

STATEMENT OF THE CASE

Introduction

Although there have been numerous hearings and three appeals in this case, there was only one trial on the merits, on September 13, 1971 before Judge Guinn

(docket entries, A. 4).[1] Petitioner's (Sakraida's) brief and the amicus brief of The Texas Farmers Union combine the originally submitted evidence with the "newly discovered evidence" as if it had all been before the trial court at the time of the trial on the merits. The evidence now principally relied on to attack validity of the Gribble and Bennett patent was not before the trial court. However, as will be later explained, it was known or readily available to Sakraida who chose not to use it until after he had an unfavorable decision on the merits from the Court of Appeals.

In reviewing this case, it is important to maintain the distinction between the evidence introduced at the trial on the merits, and the "newly discovered evidence" introduced by Sakraida at the motion for new trial more than two years later. In order to evaluate the evidence in its proper order, we will first discuss the evidence presented at the trial on the merits and later Sakraida's "newly discovered evidence." The Gribble and Bennett patent and all the prior art references introduced in evidence at the trial on the merits appear in Supp. A. 11-105. As will be later explained, the allegedly newly discovered evidence clearly failed to meet the requirements of Rule 60(b)(2) F.R.Civ.P. Further, the Mission Dairy and Mr. Herbert Meyer's testimony, which was the key to all the other allegedly

[1] The printed Appendix in this Court will be referred to as "A.". The Supplemental Appendix prepared by respondent and filed with this brief will be referred to as "Supp. A." Respondent, Ag Pro Inc., plaintiff below, will be referred to as "Ag Pro". Petitioner, Bernard A. Sakraida, defendant below, will be referred to as "Sakraida."

newly discovered evidence, were legally insufficient as prior art. Accepting Mr. Meyer's testimony at face value, the Mission Dairy became operative on October 25, 1963 (A. 253). The Gribble and Bennett patent application was filed on November 5, 1963, but the invention was completed and a sale of the patented invention had taken place by the Spring of 1963 (A. 61). It is uncontested that the date of the Gribble and Bennett invention is at least six months prior to completion of the Mission Dairy.

The patent in suit

There had been a long standing problem in the dairy industry with respect to removal of offal from barn floors. Cleaning of barn floors has always been a tedious and loathsome part of dairying. The magnitude of the task will be appreciated when it is realized that the average cow produces about sixteen gallons of manure a day. Translating this into weight, about a ton of manure is produced each day by sixteen cows. Commercial dairy herds are numbered in the hundreds and thousands of cows. That means that one hundred cows will produce six tons of manure per day (A. 107) and a twenty-two thousand cow dairy, such as Mr. Sakraida had under construction in Florida (A. 192), produces one thousand three hundred twenty tons of manure per day.

Prior to the Gribble and Bennett invention, the best established methods of cleaning dairy barn floors were with high pressure hoses, tractor blades, shovels and brooms (A. 59-60, 99-100, 107-108).

Commencing in 1961 Gribble and Bennett, who had backgrounds in engineering and dairy operation, started working on the design of a barn which would solve this problem. In 1963, after considerable study and experimentation on various systems for cleansing barn floors, Gribble and Bennett filed an application for patent which resulted in the patent in suit (Supp. A. 11-17). The patent discloses a complete system for the automatic-hydraulic removal of waste products from floor areas in a barn and the ultimate deposition by a sprinkler system of these wastes in the form of liquid fertilizer on growing areas surrounding the barn. The patented invention is limited to the construction and arrangement of the floor areas of the barn and the means for storing a volume of water on, or immediately above, the floor so that when the water is suddenly released, it will clean all of the floor areas without the use of any hand labor. According to the patented invention, which is also known as the Ag Pro system, all barn floor areas are thoroughly cleaned in a matter of a few minutes where previously it tooks hours of disagreeable labor and the use of large quantities of water to achieve an inferior result (A. 27-33, 60, 69, 73, 101-103; Pl. Ex. 9).

Professor M. G. Huber, formerly of Oregon State University who specialized in animal waste disposal, testified that when he first learned of the patented system in 1963, it made a great impression on him. "It was a complete new concept in manure removal in cleaning the dairy barn, different than anything that had ever been used" (A. 108). Mr. Darrell Reed,

a dairyman from Waco, Texas who had knowledge of dairy practices in various parts of the United States, made an investigation of dairy barn cleaning systems in 1969 prior to purchasing the patented invention and came to the conclusion that it was "revolutionary" and vastly superior to any other system which was available (A. 98-101). Mr. Robert Price who operated a large dairy in El Paso and was called by Sakraida as his only witness at the trial, knew of no floor washing means like that of the Gribble and Bennett patent (A. 90-92). Mr. Sakraida, who had many years experience in building dairies testified at his deposition, May 16, 1969, that prior to working with Ag Pro on the Dawn Dairy job, he had never heard of a flush system like the patented one other than the one which Ag Pro had previously sold to Pine Hill [Pineyhill—West] (A. 10-11).

The patent contains three claims and Sakraida was charged with infringement of claims 1 and 3.[2] Claim 1, in simplified form, calls for the following elements:

1. a smooth paved floor;

2. drains in the floor;

3. the floors sloped toward the drains;

4. cow stalls having paved bottom surfaces elevated above the barn floor;

[2] Claim 2 is not now and never has been in issue. Ag Pro did not charge Sakraida with infringement of it and Sakraida never counterclaimed for a declaration of invalidity of all claims of the patent. *Timely Products Corp.* v. *Arron*, — F.2d —, 187 U.S.P.Q. 257, 262 (2 Cir. 1975).

5. the stalls being dimensioned so that a cow in the stall will discharge offal onto the barn floor;

6. feeding, holding, milking and cow transfer areas having paved floors forming part of the barn floor;

7. floor washing means for washing at one time any or all of the barn floor areas and discharging the cow offal into the drains;

8. the floor washing means being positioned uphill from the drains and constructed to collect a pool of water above a portion of the floor so that when the water is released it will flow as a sheet to wash the floor.

Claim 3 depends from claim 1 and specifies that the floor washing means is a dam on the floor that collects water in a pool directly on the floor, so that when the dam is abruptly opened the water is released as a sheet over the floor toward the drains.

At the time of the trial the patented invention had received recognition from commercial dairies as well as from academic institutions in various parts of the country (A 61). At that time, about seventy agricultural enterprises were licensed under the patent pursuant to a reasonable one payment standard licensing fee available to anyone — a single payment of fifteen hundred dollars per installation plus one dollar per cow (A 62-3; Pl. Ex. 1).

SUMMARY OF ARGUMENT

Gribble and Bennett made a patentable invention because it solved a longstanding problem in a manner different from the prior art to produce an unexpected function and result. Gribble and Bennett taught the use of a controlled volume of water dispersed as a sheet of water of very limited duration rather than continuous spot delivery of water by high pressure hoses. The Gribble and Bennett teaching was contrary to the prior art references and contrary to the knowledge of individuals of more than ordinary skill in the dairy industry. Although, according to legend, Hercules was supposed to have diverted a river through a stable to clean it, that knowledge never produced any solution to the problem. The failure of anyone to come up with a practical solution during the thousands of years that the Hercules legend was known is strong indicia of patentable invention.

The findings of the district court were clearly erroneous because there was no evidence to support them. The findings were highly suspect because the district court mechanically signed the very findings, obvious errors and all, which Sakraida's counsel submitted.

The Gribble and Bennett patent meets the rigorous test of patentability for patents made up of combinations of mechanical elements set forth in the *Lincoln, A & P* and *Black Rock* cases. In Gribble and Bennett the claimed elements combine in a manner different from any pre-existing combination to produce a new

function and a new result, i.e., a barn floor that used to take hours to be partially cleaned is immaculately cleaned in a matter of minutes. This is a truly synergistic result because it is the combination of the claimed elements acting in concert that produces an effect greater than the sum of the parts.

The Gribble and Bennett patent fully satisfies the *Graham* test of obviousness. Although the district court held the patent invalid for obviousness, it failed to apply the *Graham* test. The Court of Appeals carefully applied the test and concluded that Gribble and Bennett met it.

Just because the Gribble and Bennett invention is simple, particularly as a matter of hindsight, that does not make it unpatentable. It has long been recognized in the decisions of this Court that simplicity is no bar to patentable invention and an appraisal of an invention at the time it was made and the impact it had on an industry, rather than hindsight, is the correct test of a patent. The simplicity of the Gribble and Bennett patent in using old elements which no one had theretofore combined to produce an unexpected result is good indication of unobviousness and patentable invention.

There is nothing improper in utilizing natural forces in a patented combination. Gribble and Bennett did not patent the effect of gravity. They claimed a specific structural combination which among other things utilized the force of gravity. In the *Eibel* case this Court specifically recognized that a small mechan-

ical change which took advantage of the force of gravity to produce a material improvement in paper manufacture was patentable invention.

The claims of the patent are not invalid for overclaiming. Unlike the *Lincoln*, *Bassick* and *Rogers* cases there is here no charge of contributory infringement against one who used an old part which was adapted for use with either the new element or with old devices. All of the elements called for in the claims are necessary to define an operative system which will produce the surprising result. Even though the washing means of Gribble and Bennett may be called the crucial element, it could not be claimed separately because the desired result cannot be achieved without combining it with the other recited elements in the claims. If the Gribble and Bennett claims did not contain all the recited elements they would be open to the attack of failing to define an operable invention and in violation of 35 U.S.C. § 112 which requires that the claims of a patent particularly point out and distinctly claim the invention.

The district court did not have jurisdiction to hear Sakraida's Rule 60(b)(2) motion for new trial based on newly discovered evidence because such a motion must be made within one year of final judgment in the *district* court. Sakraida made the motion twenty-two months after entry of the district court's final judgment. There is no jurisdiction in this Court to consider Sakraida's "newly discovered evidence".

In order for a district court to grant a motion for

new trial based on newly discovered evidence there are five requirements, each of which must be met. The first two of those requirements are that the evidence must be discovered after the trial, and the moving party must allege facts from which the court may infer diligence on the part of movant in discovering the evidence. Sakraida failed to meet either of those two requirements.

Sakraida as well as his attorney were specifically told by their agricultural expert two years before the trial of the existence of a manure flushing system at the Mission Dairy in Gonzales, California which was very similar to the patented one. They asked a friend to visit the Mission Dairy which was a showplace dairy open to visitors. When the friend reported back that the manager had refused him entry they did nothing more to find out about the dairy. Sakraida chose not to develop any evidence concerning the Mission Dairy, by pretrial discovery proceedings or otherwise, because he had a summary judgment in his favor and decided that he did not need evidence concerning the Mission Dairy to win in the district court.

It was not until after the Court of Appeals decision reversing the district court and upholding validity of the patent that Sakraida showed any diligence. At that time he received the quick and full cooperation of the owner of the Mission Dairy, Mr. Meyer. Mr. Meyer not only provided Sakraida with complete, detailed information concerning Mission Dairy, but also concerning Messrs. Souza, Rovie and Whitmore and their alleged dairy installations. Mr. Meyer testi-

fied that he had this information since 1961 or 1962 and that he was the key to providing Sakraida with all of his "newly discovered evidence". There were no facts from which the district court could have inferred diligence on the part of Sakraida in discovering the new evidence prior to trial. Just the opposite was the case and the Court of Appeals correctly set aside the findings of the district court and held that the evidence was not newly discovered and in any event could have been discovered by the exercise of reasonable diligence before trial.

The evidence concerning the Mission Dairy would not change the outcome of the case because it was completed too late to serve as prior art. The Mission Dairy was not completed and in operation until the end of October 1963. The Gribble and Bennett invention was completed and the first sale of the patented dairy barn construction was made in the Spring of 1963. Mission Dairy is at least six months too late to be used as prior art against the Gribble and Bennett patent.

The "newly discovered evidence" was improperly received in evidence for several reasons. More than five months prior to the hearing on Sakraida's motion for new trial, Ag Pro served on Sakraida a motion pursuant to Rule 34 F.R.Civ.P. to produce all documentary evidence purportedly disclosing prior art pertinent to the patent in suit. The motion was resisted by Sakraida for no valid reason. The district court erroneously denied Ag Pro's repeated attempts to obtain those documents prior to trial. At the trial the

Court permitted Sakraida to place in evidence all the documents he wished that purportedly disclosed prior art pertinent to the Gribble and Bennett patent.

Further, prejudicial error was committed by the district court in receiving in evidence all of the documents offered by Sakraida at the hearing on his motion for new trial, as well as the testimony of Messrs. Rovie and Whitmore. 35 U.S.C. § 282 requires a party to give thirty days notice prior to hearing to the other party specifically identifying any documents or witnesses he intends to rely upon to anticipate the patent or show prior knowledge, use, or sale of the patented invention. In the absence of such notice no proof of those matters will be received except upon such terms as required by the court. The district court received all this evidence without requiring any terms from Sakraida, and when Ag Pro's counsel attempted to put in rebuttal evidence the court informed him that the evidence was closed. The district court then passed directly on the merits of the Gribble and Bennett patent after having previously repeatedly stated that it would not pass on the merits.

The amicus brief of The Texas Farmers Union is premised on an erroneous understanding of at least two uncontradicted facts in this case. (1) If the Gribble and Bennett patent is upheld, Ag Pro will not exact an expensive toll from farmers because everyone has always been able to get a license by the payment of a single modest fee. (2) The Mission Dairy was not in existence more than one year before the filing date of the Gribble and Bennett patent application but

came into existence after the date of the Gribble and Bennett invention and is, therefore, not prior art.

The argument in the Texas brief that Rule 60(b) should be interpreted differently in patent cases from other cases because of reasons of public interest is unsound. In any event, there is no matter of public interest in the present case that would suggest such a chaotic way of interpreting the Federal Rules.

ARGUMENT

Gribble and Bennett made a patentable invention.

Perhaps the strongest evidence of patentable invention is the solution of a longstanding problem in an industry. In this case we have an age old problem because ever since man first housed cattle, the removal of their offal has plagued him. Although we have known since antiquity the legend of Hercules cleansing the Augean stables by diverting the river Alpheus through the stables, this never sparked any solution to the dairymen's problem. Probably because the effect on the buildings and occupants of a rushing torrent, as well as anyone downstream, was more devastating than the problem. In any event, as shown by the prior art cited against Gribble and Bennett in the Patent Office (Supp. A. 18-105), the attempts to solve the problem by those most knowledgeable in the industry were in the opposite direction. They taught the spot delivery of water from relatively high pressure hoses which directed a stream of water that selectively impinged on the refuse material. As opposed to that Gribble and Bennett taught the sudden release of a controlled volume of relatively low pressure water that dispersed as a sheet or wave which cleaned all floor areas almost instantaneously.

When the patented construction is described to dairymen, most of them don't think that it will work, but once they have seen an installation in operation, they are convinced and become very enthusiastic about the invention (A. 61-62). Because it is necessary for comprehension of the invention, even for those skilled in the art, to see the patented invention in actual operation, it is important that the Court view the two and one-half minute film strip which was shown to the Fifth Circuit at the argument on the merits. At that time the judges on the panel indicated that the movie assisted them in understanding the invention and it is specifically mentioned in the court's opinion, 474 F.2d 167, 170. The film is a condensed version of a much longer one shown and described to the district court (A. 70-73; Pl. Ex. 9). It is the only way, short of an on-site inspection, that this Court can appreciate the dramatic manner in which the invention changes a filthy barn floor into an immaculate one in less than two minutes without the use of any hand labor.[3] The film has been lodged with the Clerk of the Supreme

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[3] In *Goodson-Todman Enterprises, Inc.* v. *Kellogg Co.*, 513 F.2d 913 (9 Cir. 1975) the court commented on the assistance it received in viewing a film in a copyright case. See particularly Judge Ely's concurring and dissenting opinion in which he states that the viewing of the film was dispositive of the merits of the case.

Court so that the Justices will have it (as well as the longer version Pl. Ex. 9) available to them for viewing prior to argument as well as during their deliberations. The few minutes it takes to view the film will make clear what thousands of words of description cannot adequately describe.

Professor M. G. Huber, with degrees in both agriculture and mechanical engineering from the University of Wisconsin and the author of thirty or more publications relative to dairy housing and animal waste disposal, specialized in the design of farm buildings and animal waste disposal. He had extensive practical as well as academic experience in the art with which we are particularly concerned (A. 104-105). He testified that when he first saw the patented system in 1963 it was a completely new concept to him in the removal of manure from a barn, and different from anything that he had ever known (A. 108). Professor Huber testified in detail concerning the prior art relied on by Sakraida at the trial and concluded that none of it either individually or in combination taught the patented invention (A. 113). His detailed testimony appears at A. 109-113 and the Court of Appeals summarized it in its opinion, 474 F.2d at 170-71.

The testimony of Mr. Darrell Reed, a dairyman who had substantial knowledge of dairy practices in various parts of the United States, also strongly indicated the existence of patentable invention in the Gribble and Bennett patent. He testified:

"Q. Will you relate to us as completely as you

can what your impression was when you saw the Ag Pro system?

A. Well, of course this was so revolutionary from the methods we had been using over the years, and like I say, I think I was kind of born on the end of a manure scoop. We had done this since childhood and the thing I think that probably impressed me the greatest was the cleanliness of the thing after the flush. This was, as I was referring to it later, it was the clean, clean, you know, much better than what we had been able to do with our scrapers and hoses and so forth in the past." (A. 101).

* * *

"Q. — I would — excuse me, I would like for you to compare cleaning under the old — the best old method that you were familiar with and how long it would take to do a comparable job with the Ag Pro system.

A. Well, I will have to speak for my own cow group. We have 62 cows to a group. They are housed, fed and everything within this area. The physical time involved in cleaning that with this system is two or three minutes. In other words, the length of time it takes to drop our gates and close them back up. Now to try to compare that to a comparable cleaning job is a little difficult but to blade it off and hose it down and come to the same degree of cleanliness, I would say, it would take a minimum of about three hours to drag this out and hose it and broom it down to this degree.

Q. As a practical matter, did you, under the old system, ever maintain all of these areas, not just the milking area but all the living areas under these conditions of sanitation?

A. No, sir.
Q. Such as you have with the Ag Pro system?
A. No, sir.
Q. Why didn't you?
A. It was just not feasible.
Q. You are talking about the economics of it?
A. From an economic standpoint you never could accumulate that much labor to clean and hose and brush that large an area. It was just not feasible." (A. 102-03).

Mr. Robert Price, the expert called by Sakraida to testify at the trial, operated a large dairy in El Paso, Texas and over the years became familiar with the dairy business nationally by visiting dairies in various parts of the United States (A. 84-5). Mr. Price testified that he knew of no prior floor washing means like that of the Gribble and Bennett patent (A. 89, 92), nor had he heard of diversion of a stream or the like to wash the floor of a dairy barn in this country. The only thing of that nature Mr. Price knew about were some pictures an associate of his took in 1967 in Costa Rica of diversion of a stream through a barn (A. 90-91). Mr. Price testified:

"Q. Let's talk about this country. Did you ever know of a barn cleaning system that existed in this country prior to 1963 in which the water was collected as a pool on or above the floor of the barn?
A. My own knowledge?
Q. Tell me about your own installation.
A. I have a large storage tank that holds 50,000 gallons. We have a pressure pump connected to this and using two or three hoses with

at least 50 pounds of pressure we flood the water — flood the floor and wash the offal.
Q. Through hoses?
A. Through hoses, yes, which are outlets to the tank, as far as I am concerned.
Q. The water comes out from a nozzle of a hose, doesn't it?
A. That is the means of transportation, yes.
Q. Did you ever hear of any barn where there was such a tank and the tank and the water were suddenly released to flood, to wash down as a sheet of water?
A. Prior —
Q. — to 1963?
A. No, I have not." (A. 92).

At the trial on the merits, Sakraida relied solely on the testimony of Mr. Price, five prior art patents, two articles, and the record made in connection with Sakraida's motion for summary judgment (A. 93-7). That record included the affidavits of Fairbank, Sakraida and Sharp (A. 34-44) which were simply conclusory statements that at some unidentified locations in Weed, Lodi and Bishop, California, flush systems like the patented one existed prior to 1963. Nothing was said in those affidavits as now argued by Sakraida concerning the use of weir boards or gates (Pet. Br. 45). The Court of Appeals quite correctly dismissed these affidavits as adding little to the understanding of the prior art, 474 F.2d at 170.

The Patent Office file history of the Gribble and Bennett patent was before the trial court, and Sakraida argues that some of the initial statements

made by the Patent Office Examiner during the course of prosecution of the application support the district court's findings of fact (Pet. Br. 12-15). This argument ignores the fact that the final opinion of the Examiner was that the finally presented claims in the Gribble and Bennett patent application defined patentable invention over the prior art and particularly McCornack Patent 2,081,947 (Supp. A. 55, Def. Ex. 7) and Bogert Patent 2,233,766 (Supp. A. 75, Def. Ex. 8). McCornack disclosed a plurality of water pipes located at numerous locations to discharge water under pressure to narrow gutters in the floor. Bogert is similar in that again he relied on a plurality of pipes to deliver water under pressure to gutters. Neither of these patents had any suggestion of collecting water behind a dam on the barn floor, for sudden release to produce a wave-like action which almost instantaneously cleans all barn floor areas.

There was simply no evidence, much less substantial evidence, to rebut the statutory presumption of validity, 35 U.S.C. § 282 (Supp. A. 4). That presumption is not an idle gesture, and the burden of establishing invalidity rests heavily on the party asserting it. *Radio Corp.* v. *Radio Engineering Lab.*, 293 U.S. 1, 7 (1934); *Mumm* v. *Decker & Sons*, 301 U.S. 168, 171 (1937).

The findings of the district court were clearly erroneous

All of the evidence before the district court indi-

cated that Gribble and Bennett had made a patentable invention. It was not a question of weighing the evidence and deciding whether Sakraida's evidence overcame the statutory presumption of validity. There was simply no evidence on which the patent could be invalidated. In setting aside the district court's findings the Court of Appeals was only carrying out the "clearly erroneous" requirement of Rule 52(a) F.R. Civ.P.

In addition to the findings being contrary to the evidence, they were highly suspect because they were not the independent work product of the district court. The lack of care and attention given the matter by the district court was indicated by its mechanically signing the very findings and conclusions submitted by Sakraida's counsel which contained a number of obvious errors. If the court had gone to no more trouble than to have a secretary proofread or even recopy Sakraida's findings prior to signing them, at least some of those errors would have been caught.[4]

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[4] These obvious errors in the findings are as follows: (1) Ag Pro did not charge Sakraida with infringement of claim 2 which is the only claim calling for a water dump tank, yet throughout the findings reference is made to the tank as if it were an element in controversy. Sakraida made no counterclaim for declaration of invalidity of all the claims of the patent and thus claim 2 has never been in issue. (2) Finding 2(b) "scuffer" should be — scupper — (A. 48). (3) Finding 3 the date on which Ag Pro filed its supplemental memorandum in opposition to Sakraida's motion for summary judgment was left blank (A. 51). (4) Finding 4 beginning line 4 states "the Holz patent, the Ingraham patent, the Kreutzer patent," (A. 51). There were two Holz patents, and one Ingraham patent cited in the Patent Office (Supp. A. 17) but none of them were put in evidence. Sakraida put two Kreutzer patents in evidence (Supp.

In *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, 656 (1964), the Court said "Those [findings] drawn with the insight of a disinterested mind are, however, more helpful to the appellate court[4]." In footnote 4, the Court quoted with approval Judge Wright's sharp criticism of trial judges who mechanically sign findings put under their noses by the prevailing party's lawyer.

The Gribble and Bennett patent meets the test of patentability enunciated by this Court in the latest series of cases that invalidated patents

In order to decide the present case, it is unnecessary for the Court to resolve any conflicts[5] which may exist between *Black Rock*[6] and earlier cases. The Gribble and Bennett invention meets the rigorous test of patentability stated by the Court in its latest series of cases which invalidated patents claiming combinations of mechanical elements.

In the *Lincoln*,[7] *A & P*,[8] and *Black Rock* cases the

A. 27-54, Def. Exs. 5, 6). (5) Finding 5, line 9 in the original document, the word "flushing" was spelled "flusing" but was inadvertently corrected in the printed appendix (A. 52). (6) Conclusion 5, line 7 "existant" should be — existent — (A. 54). (7) In the last paragraph of "Conclusions of Law," the name of the defendant in the case is — North Plains Fertilizer and Chemical Inc. — and not "North Plains Fertilizer & Co." (A. 55).

[5] "After Black Rock: New Tests Of Patentability — The Old Tests of Invention", 39 Geo. Wash. L. Rev. 123 (1970), Supp. A. 106-134.

[6] *Anderson's-Black Rock* v. *Pavement Salvage Co.*, 396 U.S. 57 (1969).

[7] *Lincoln Engineering Co.* v. *Stewart-Warner Corp.*, 303 U.S. 545 (1938).

[8] *Great A. & P. Tea Co.* v. *Supermarket Equip. Corp.*, 340 U.S. 147 (1950).

Court reiterated a test for determining patentability of inventions involving combinations of mechanical elements, i.e., that old elements must combine to produce a new or different function or operation from what they previously performed or produced. However, in *A & P*, the Court expressly recognized that patentable invention could reside in a new combination of old elements.[9]

Throughout the opinion in *Lincoln*, it is stressed that the invention resided in the improved "coupling member" and that combining that element with the other old elements failed to produce a "new or different function or operation" and was, therefore, not patentable. However, there is no holding in that case or any other, that a combination of old elements could not be the subject of a valid patent.

In the *A & P* case, the Court stated at the beginning of its opinion that the allegedly new element, a counter with an extension, was never claimed as such. The Court said, 340 U.S. at 149:

> "In the first place, the extension is not mentioned in the claims, except, perhaps, by a construction too strained to be consistent with the clarity required of claims which define the boundaries of a patent monopoly."

The Court went on to say that the patent would not be invalid for overclaiming if its other old elements "made up a new combination patentable as such." The Court then said, 340 U.S. at 152:

[9] 340 U.S. at 150.

> "The conjunction or concert of known elements must contribute something; only when the whole in some way exceeds the sum of its parts is the accumulation of old devices patentable."

In *Black Rock*, the Court said that the radiant heat burner which had been attached to a standard paving machine had previously been patented as such and that the operation of the heater was in no way dependent on the operation of the other equipment on the paving machine. The Court also stressed that the presence of the radiant-heat burner in the same machine with the other elements was not critical or essential to the functioning of the radiant-heat burner in curing the problem of the cold joint.[10]

In Gribble and Bennett, the floor washing means cannot perform its required function independently from the other elements recited in the claims. The uncontested evidence is that the presence of the floor washing means with the other elements is critical and essential to the functioning of the floor washing means to cleanse a barn floor (A. 75).

In *Black Rock*, the Court said that a combination of elements may result in an effect greater than the sum of the several effects taken separately but that no syngeristic result had been argued in that case."[11]

The Gribble and Bennett combination of elements results in an effect greater than the sum of the several effects to produce a syngeristic result as required by *A & P*, i.e., cleansing of a barn floor to an immaculate condition in a matter of minutes where it used to take hours of hard labor to produce an inferior result.

[10] 396 U.S. at 59, 60.
[11] 396 U.S. at 61.

The requirement of *Lincoln, A & P* and *Black Rock* that the combination of elements must contribute something new or different or exceed the sum of the parts is fully met by the combination claimed in Gribble and Bennett.

There was no attack and the district court did not find that Gribble and Bennett failed to meet the novelty and usefulness requirements of 35 U.S.C. §§ 101 and 102 (Supp. A. 2-3). However, the district court concluded that the patent was invalid for obviousness, 35 U.S.C. § 103 (A. 53, Supp. A. 4), but it failed to apply the obviousness test required under *Graham* v. *John Deere Co.*, 383 U.S. 1, 17 (1966):

> "Under § 103, the scope and content of the prior art are to be determined; differences between the prior art and the claims at issue are to be ascertained; and the level of ordinary skill in the pertinent art resolved."

The Court of Appeals recognized the necessity of applying the *Graham* test, carefully reviewed the evidence in the light of that test and came to the conclusion that the invention was not obvious and the patent valid.

The scope and content of the prior art was the same as that which was considered and overcome in the United States Patent Office. Ag Pro has never

denied that the prior art showed the existence of dairy barns having smooth paved surfaces; floor drains; cow stalls having paved bottom surfaces elevated above the barn floor; stalls dimensioned so that a cow in the stall will discharge offal in gutters; feeding, holding, milking and cow transfer areas all having paved floors; high pressure hoses and sprinkler systems for discharging water into gutters and onto barn floor areas; pools of water, and water tanks. However, none of the prior art ever combined the elements as taught by Gribble and Bennett or showed a floor washing means constructed to collect a pool of water above a portion of the floor so that when the water was released, a controlled amount flowed as a sheet which almost instantaneously cleaned all barn floor areas and discharged the cow offal into drains where it was collected and utilized. The concept is not only different from anything that previously existed, but contrary to the prior art teachings of cleaning barn floors with scrapers, hoses, sprinklers, or a river. The patented system resulted in an elimination of clean-up labor cost, lower capital investment, use of substantially less water and an unheard-of degree of cleanliness (A. 60, 70-73, 101).

The differences between the prior art and the claims at issue as mentioned above, reside in the combination and in the floor washing means defined in claims 1 and 3.[12]

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[12] Claim 1.
"... floor-washing means for washing the floor providing the walking surface in the barn where said floor bottoms said feeding, holding, milking and transfer areas operable to send wash water flowing over the floor with such water washing any cow offal thereon into said drain means, said floor-washing including means located over a region of said floor which is uphill from said drain means constructed to collect water as a pool above said floor and operable after such collection of water as a pool to disperse the water as a sheet of water over said floor."

Claim 3.
"The barn of claim 1, wherein said floor-washing means comprises a dam for damming and collecting water as a pool directly on the floor, and such dam is abruptly openable to send such water as a sheet over the floor toward said drain means."

The third factual inquiry required by the *Graham* case is the level of ordinary skill in the pertinent art at the time the invention was made. The prior art documents previously discussed show what the published level of the state of the art was. As far as practical knowledge, the testimony was that shovels, brooms, tractor blades and high pressure hoses were the best ways up until the time of Gribble and Bennett to clean barn floors. It is uncontradicted that the patented combination of elements was able to produce the result of cleaning a barn floor without any hand labor in a matter of a few minutes, where previously it took hours of disagreeable, hard labor to produce an inferior result. This is a new, different and unexpected result. Gribble and Bennett combined existing elements in such a way as to produce a result which was of a completely different nature from that produced by the sum of the elements taken independently. This is a synergistic result which is patentable under any test applied by this Court in cases which either

invalidated or upheld patents.[13]

All of the evidence established that the patented combination produced a dramatic functional change over the prior art. Even though water collected in large tanks or in pools existed previously, no one prior to Gribble and Bennett ever suggested that it could be abruptly released as a sheet and used as a floor washing means in combination with the other necessary elements of barn construction. The combination was not obvious to a person skilled in the art because neither Mr. Sakraida nor his experts, Messrs. Fairbank and Price, had ever heard of the combination, and Messrs. Reed and Huber, who had at least more than ordinary skill in the art, testified that it was revolutionary and completely different from anything they had ever known.

Simplicity of an invention does not indicate obviousness but may well indicate nonobviousness

There is a disarming simplicity in the Gribble and Bennett invention, particularly as a matter of hind-

[13] *United States* v. *Adams*, 383 U.S. 39 (1966); *Webster Loom Co.* v. *Higgins*, 105 U.S. (15 Otto) 580 (1882). In *Illinois Tool Works, Inc.* v. *Sweetheart Plastics, Inc.*, 436 F.2d 1180, 1187 (7 Cir. 1971), cert. den. 403 U.S. 942 the court said:

> "This 'synergistic effect' test is especially applicable where, as here, the use of two or more elements together both increases the effectiveness of one of the elements *and* successfully achieves something denied the marketplace in the past."

See also *Tapco Products Co.* v. *Van Mark Products Corp.*, 446 F.2d 420, 427 (6 Cir. 1971), cert. den. 404 U.S. 986.

sight. Sakraida's brief stresses that all Gribble and Bennett did was to use ordinary, simple parts and come up with a simple solution which is therefore obvious and unpatentable. The solution now appears to be simple only after Gribble and Bennett taught the industry how to put the old elements together in a way that they never previously had been combined to produce an unexpected result. Sakraida uses a hindsight test rather than an evaluation of the invention at the time that it was made and the effect it had on the industry and knowledgeable people in the art.[14] **If in fact it had been so obvious and simple to do what Gribble and Bennett did, someone would have done it prior to them.** As this Court said in *Diamond Rubber Co.* v. *Consol. Rubber Tire Co.*, 220 U.S. 428, 434-35 (1911):

> "Its simplicity should not blind us as to its character. Many things, and the patent law abounds in illustrations, seem obvious after they have been done, and, 'in the light of the accomplished result,' it is often a matter of wonder how they so long 'eluded the search of the discoverer and set

[14] In *Safety Car Heating & Lighting Co.* v. *General Elec. Co.*, 155 F.2d 937, 939 (2 Cir. 1946), Judge Learned Hand said:

> "In appraising an inventor's contribution to the art, as we have often said, the most reliable test is to look at the situation before and after it appears. Substantially all inventions are for the combination of old elements; what counts is the selection, out of all their possible permutations, of that new combination which will be serviceable . . . and — perhaps most important of all — the extent to which it superseded what had gone before. We have repeatedly declared that in our judgment this approach is more reliable than a priori conclusions drawn from vaporous, and almost inevitably self-dependent general propositions."

See also Judge Hand's opinion in *Reiner* v. *I. Leon Co.*, 285 F.2d 501, 503-04 (2 Cir. 1960), cert. den. 366 U.S. 929.

at defiance the speculations of inventive genius.' [citations omitted.] Knowledge after the event is always easy, and problems once solved present no difficulties, indeed, may be represented as never having had any, and expert witnesses may be brought forward to show that the new thing which seemed to have eluded the search of the world was always ready at hand and easy to be seen by a merely skilful attention."

The *obviousness* test of patentability had its origins almost one hundred years ago in the decisions of this Court. In *Webster Loom Co.* v. *Higgins*, 105 U.S. (15 Otto) 580, 591 (1882) the Court said:

"This argument would be sound if the combination claimed by Webster was an *obvious* one for attaining the advantages proposed, one which would occur to any mechanic skilled in the art. But it is plain, from the evidence and from the very fact that it was not sooner adopted and used, that it did not, for years, occur in this light to even the most skillful persons. *It may have been under their very eyes, they may almost be said to have stumbled over it; but they certainly failed to see it*, to estimate its value and to bring it into notice. Who was the first to see it, to understand its value, to give it shape and form, to bring it into notice and urge its adoption, is a question to which we shall shortly give our attention. At this point we are constrained to say that we cannot yield our assent to the argument, that the combination of the different parts or elements for attaining the object in view was so *obvious* as to merit no title to invention. Now that it has succeeded, it may seem very plain to anyone, that

he could have done it as well. This is often the case with inventions of the greatest merit." (emphasis added)

And ten years later in *Washburn & Moen Mfg. Co.* v. *Beat 'Em All Barbed Wire Co.*, 143 U.S. 275, 282, 283 (1892) the Court quoted with approval from *Webster* the first portion of the above cited quotation in which the word "obvious" was used.

The early origin of the obviousness test was apparently not brought to the attention of the Court in the *Graham* case, because *Webster* and *Barbed Wire Patent* were nowhere referred to in its opinion. There is a close factual and legal similarity between the present case and those cases (combinations of relatively simple mechanical elements) and we respectfully urge the Court to review those decisions. We believe that the Gribble and Bennett invention was not obvious for the same reasons as found in *Webster* and *Barbed Wire*.

On numerous occasions this Court has expressly said that simplicity does not negate invention and that hindsight may not be used to equate obviousness with simplicity. [15] Likewise the courts of appeals have followed this Court's decisions and rejected the argument

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[15] *Goodyear Tire & Rubber Co.* v. *Ray-O-Vac*, 321 U.S. 275, 279 (1944); *Expanded Metal Co.* v. *Bradford*, 214 U.S. 366, 381 (1909); *C. & A. Potts & Co.* v. *Creager*, 155 U.S. 597, 607-08 (1895); *Krementz* v. *S. Cottle Co.*, 148 U.S. 556 (1893); *Washburn & Moen Mfg. Co.* v. *Beat 'Em All Barbed Wire Co.* (The Barbed Wire Patent), supra at 277; *Webster Loom Co.* v. *Higgins*, supra at 591.

that simplicity of an invention means obviousness.[16]

We believe the Fifth Circuit in this case correctly and succinctly stated the test of obviousness laid down by the statute, 35 U.S.C. § 103, and the decisions of this Court when it said:

> "The crucial issue of obviousness can only be resolved through reference to the precise facts presented, not through logical or intuitive analysis distorted by the invention's simplicity and retrospective self-evidence." (474 F.2d at 169-70)

Gribble and Bennett did not patent the idea of using gravity to make water flow downhill

At numerous places in his brief Sakraida argues that the patent is invalid because "gravity and not invention" causes water to run downhill and that all that Gribble and Bennett did was to patent the use of water running downhill. The Gribble and Bennett

[16] Some such relatively recent decisions are: *Norman* v. *Lawrence*, 285 F.2d 505, 506 (2 Cir. 1960); *Shaw* v. *E. B. & A. C. Whiting Company*, 412 F.2d 1097, 1104-05 (2 Cir. 1969); *Allen* v. *Standard Crankshaft & Hydraulic Company*, 323 F.2d 29, 34 (4 Cir. 1963); *Arnold Pipe Rentals Co.* v. *Engineering Enterprises, Inc.*, 350 F.2d 885, 890 (5 Cir. 1965). In *National Dairy Products Corporation* v. *Borden Company*, 394 F.2d 887, 890 (7 Cir. 1968), cert. den. 393 U.S. 953, the court pointed out that the fact that the individual old elements were available to the industry for a long time and no one had previously combined them was good evidence of nonobviousness. In *Woodstream Corporation* v. *Herter's, Inc.*, 446 F.2d 1143, 1150, 1157 (8 Cir. 1971) the Eighth Circuit after noting that it had not upheld validity of a patent since the *Graham* case, reversed a district court finding of invalidity on a patent for a simple animal trap even though the invention might appear obvious through the use of hindsight.

patent does not attempt to patent the idea of gravity's effect on water running downhill. What is described and claimed in the patent is a particular building construction in which, along with the other necessary elements, a pool of water is collected so that when abruptly released the force of gravity acting on the water produces a fast moving sheet of water that performs the washing action. Because Gribble and Bennett use gravity flow of water, rather than the pressure produced when water is forced through a nozzle to clean, does not mean that they attempted to patent gravity.

It is perfectly proper to utilize natural forces in patented combinations, and it was specifically so held with respect to gravity by this Court in *Eibel Process Co.* v. *Minnesota & Ontario Paper Co.*, 261 U.S. 45 (1923). The invention in that case was for an improvement in the Fourdrinier paper-making machine and involved lifting one end of the moving wire of the machine about fifteen inches so that, as the stock flowed onto it, it had the added force of gravity and it would travel at about the same speed as the wire. By using gravity to increase the speed of the stock, a rippling effect, which previously had caused problems in paper making was eliminated, and production of paper was increased about twenty percent. The court of appeals had reversed the district court and invalidated the patent believing that all that the patentee had done was to obtain a patent on the principle that water will run downhill. This Court reversed and held the patent valid, and quoted with approval a statement

by the district judge that the Eibel invention involved the use of gravity with other elements.[17]

The Gribble and Bennett claims are not invalid for overclaiming

Sakraida argues that the patent is invalid for overclaiming (Pet. Br. 47-8), citing *Lincoln Engineering Co.* v. *Stewart-Warner Corp.*, 303 U.S. 545 (1938). The underlying facts in *Lincoln* are significantly different from the present case. First it should be remembered that *Lincoln* involved an action for contributory infringement, rather than one for direct infringement which is our case. In *Lincoln* the patentee developed a new coupling by which a pressure actuated grease gun could be connected to a nipple fitting for lubricating bearings, especially those of automobiles. The nipple fitting with which the coupling was to connect, and the pressure-operated grease gun on which the coupling was mounted were both old, and were adapted for use either with the patentee's new coupling or with previously known couplings. In claiming the invention, the patentee recited a com-

[17] " 'The process invented by him [Eibel] begins to operate after the stock has entered upon the wire. His apparent attempt was to get rid of bubbles and wrinkles before he got to the place on the machine where paper is formed. To do this, he allowed gravity to work with "drag" and with "head." He harnessed all the elements he could find. He brought gravity in with the other elements; and so brought the speed of the stock up to equality with that of the wire. By this means he achieved high speed and also freed the stock on the wire from waves and ripples.' " (261 U.S. at 64)

bination including the old nipple fitting with which the new coupling was adapted to be used. As noted by the Court, the nipple fitting was not necessary to the framing or recitation of an operative combination to define the invention, because the coupling was the novel feature and could have been claimed separately. The patentee sued defendant for contributory infringement for selling old style nipple fittings which were merely adapted for use with the new coupling. Thus, it was evident, that the patent holder was attempting illegally to extend the monopoly granted under the patent to include old fittings adapted for use either with old couplings or with the new coupling.

The Court in *Lincoln* was concerned that the patentee was not merely trying to protect against others making, using and selling the new coupling, but instead was attempting to extend his patent monopoly to cover sellers and users of old nipple fittings which were adapted for use with either the new or old style couplings. To prevent this the Court invalidated the patent citing overclaiming.

While the rationale of the *Lincoln* case has been termed unclear and its citation of *Rogers* v. *Alemite Corp.*, reported with *Bassick Mfg. Co.* v. *Hollingshead Co.*, at 298 U.S. 415 (1936) as controlling of the situation, termed questionable[18] we need not question those cases because an analysis of the present one shows how markedly different it is from the past cases on overclaiming.

[18] "After Black Rock: New Tests of Patentability — The Old Tests of Invention," 39 Geo. Wash. L. Rev. 123, footnote 66 at pp. 132-33, (Supp. A. 115-16).

As previously mentioned the present case is not analogous to the *Lincoln*, *Bassick*, or *Rogers* cases because there is no charge of contributory infringement against one making, using or selling an old element which was merely adapted to be used with a new claimed element. Instead, Ag Pro is seeking to halt the activities of one who directly infringed by making and selling structures which included every element of claims 1 and 3. Further, Sakraida could have taken a license under the patent on the same reasonable basis as available to anyone (A. 62).

Another distinguishing feature is that in the present case, the patent claims include only those elements necessary to define an operative system which will produce the desired result of rapidly removing waste products from a dairy barn floor. Each of the elements recited in the claims is necessary to define an operative system which will produce the desired cleansing of all floor areas in the barn. Although the floor washing means may be the crucial element in the combination it was necessary to claim it in combination with the other old elements to produce the desired result. There is no single novel element in Gribble and Bennett which could be claimed separate from the other elements. This is a true combination because the operative invention exists only when all the claimed elements are brought together. That is the fundamental difference between the patent in suit and the patents involved in the *Lincoln*, *Bassick* and *Rogers* cases.

Having recognized that the invention resided in a novel combination of old elements, it was necessary for

the inventors to include in the claims all of the elements necessary to produce the new and different result. Unless the invention had been claimed as it was, the patent would have been subject to attack for failing to define an operative system.

At least as early as *Gill* v. *Wells*, 89 U.S. (22 Wall) 1, 25-26 (1874) the Court said that it was "of the greatest importance," particularly in patents made up of combinations of old elements, that the claims and description be full, clear, concise and exact. Again in *General Electric Co.* v. *Wabash Appliance Corp.*, 304 U.S. 364, 369 (1938) the same thing was emphasized. That requirement is codified today in 35 U.S.C. § 112 which states, in part:

> "The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention."

Had the Gribble and Bennett patent recited fewer elements, it would have been open to the attack of reciting insufficient elements to define an operative combination, and/or to the attack that the invention was claimed too broadly. A review of the claims of the patent shows that they meet the statutory requirement of fully, clearly, concisely and exactly defining the invention. All the recited elements are necessary to the definition of the inventive combination.

The recitation of additional elements in a claim does not broaden the protection granted to the patentee, but instead narrows the scope of protection.

Since an infringement occurs only if an alleged infringing product includes all of the claimed elements, it is in the interest of the patentee to obtain claims which include the fewest possible elements. That was specifically recognized in *Williams Mfg. Co.* v. *United Shoe Mach. Corp.*, 316 U.S. 364 (1942). Also, the distinguishing features of the *Bassick* and *Lincoln* cases, regarding contributory infringement discussed above, were recognized by the Court in *Williams* (316 U.S. at 368-370).

Sakraida's brief refers to the *A & P* case as supporting the charge of overclaiming (Pet. Br. 48). The Court in *A & P* only mentioned overclaiming in passing (340 U.S. at 150), and as a basis for its statement cited the *Bassick* case rather than the *Lincoln* case. It is noteworthy that in the same passage in *A & P* discussing overclaiming, the Court said that there would not be overclaiming if the old elements were combined to produce a new combination (340 U.S. at 150).

The overclaiming defense has no merit because the Gribble and Bennett claims include only those elements necessary to define an operative structure which produces the desired novel result, and there is no attempt to extend the patent coverage by charging contributory infringement against one who merely makes an old element of the patented combination.

Sakraida's Allegedly Newly Discovered Evidence

1. The district court did not have jurisdiction to hear the motion for new trial based on newly discovered evidence

Sakraida's motion for a new trial was made pursuant to Rule 60(b)(2) F.R.Civ.P. which requires that a motion for a new trial based on newly discovered evidence must be made "not more than one year after the judgment, order or proceeding was entered or taken" (Supp. A. 1).

On September 23, 1971, the district court entered a final judgment holding the Gribble and Bennett patent invalid (A. 55). Ag Pro appealed that judgment and on February 5, 1973 the Court of Appeals handed down its opinion reversing the district court, held the patent valid, and remanded for a determination of the issue of infringement, 474 F.2d 167. On February 17, 1973, Sakraida filed a petition for rehearing in the Court of Appeals, one of the grounds of which was "discovery of new evidence since the date of the entry of the trial court's judgment." On June 25, 1973, the Court of Appeals granted the petition for rehearing to the extent of treating it as the "substantial equivalent of a motion under Rule 60(b)(2) F. R. Civ. P." and remanded to the district court for consideration of a motion under that rule to be filed by Sakraida, 481 F.2d 668. On July 27, 1973, Sakraida filed his motion in the district court for a new trial pursuant to Rule 60(b)(2), (A. 120).

Sakraida, therefore, moved under Rule 60(b)(2)

twenty-two months after entry of the final judgment of the district court. Although Sakraida moved under Rule 60(b)(2) within one year from the date of the opinion of the Court of Appeals upholding validity of the patent (February 5, 1973), Ag Pro contends that the language of Rule 60(b)(2) "a final judgment, order or proceeding" means only in a district court and not in an appellate court.

The full title of the controlling rules is "Federal Rules of Civil Procedure for the United States District Courts." Rule 1, "Scope of Rules" expressly states that "These rules govern the procedure in the United States district courts in all suits of a civil nature. . . ." (Supp. A. 1).

A motion for new trial under Rule 60(b)(2) is contrary to the finality of judgments and is not one of those motions which is generally looked upon favorably. Because the rule is contrary to the finality of a judgment it should be strictly construed, and the requirements of the rule rigorously enforced against one seeking relief thereunder.[19]

As far as we have been able to determine, the jurisdictional question here raised has never been decided by this Court. Two courts of appeals have indicated conflicting opinions on the question, but in neither case were those courts squarely confronted with the question here presented.

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[19] *Strauss* v. *United States*, 337 F.2d 853 (5 Cir. 1964); *Kithcart* v. *Metropolitan Life Ins. Co.*, 119 F.2d 497, 500 (8 Cir. 1941), cert. den. 315 U.S. 808.

In *Corn* v. *Guam Coral Co.*, 318 F.2d 622, 629 (9 Cir. 1963) the court said:

> "The time limit for making a motion under Rule 60(b), as set out in the second sentence of that rule, begins to run upon the entry of 'the judgment, order or proceeding,' referred to in the first sentence. Accordingly, under the federal rule, the maximum period of one year within which such a motion must be filed for reasons (1), (2) and (3) of that rule, begins to run when such *district court* judgment or order was entered, or such *district court* proceeding was taken." (emphasis added).

In *Transit Casualty Company* v. *Security Trust Company*, 441 F.2d 788, 791 (5 Cir. 1971), cert. den. 404 U.S. 883, the court made a contrary interpretation of Rule 60(b)(2), and in support cited *Federal Trade Com.* v. *Minneapolis-Honeywell R. Co.*, 344 U.S. 206 (1952). The *FTC* case does not support the Fifth Circuit decision because it involved the computation of time for a petition for writ of certiorari and not a motion under Rule 60(b)(2). Petitions and appeals to this Court are governed by the "Rules of the Supreme Court of the United States" and not by the Federal Rules. Further, on December 4, 1967, this Court adopted the "Federal Rules of Appellate Procedure" which abrogated the existing rules of civil procedure to remove therefrom all reference to appeals under old rules 72-76. This is additional indication that the present rules of civil procedure are limited to the district courts.

Professor Moore in his treatise supports the propo-

sition that the language of Rule 60(b)(2) refers to ". . . within one year from the entry of the final judgment in the *district court*" (emphasis added).[20]

If Rule 60(b)(2) were not limited to final judgments in the district court, a party could wait to make a motion for new trial until such time as the matter was finally decided by this Court in a manner that changed the substance of the lower courts' judgments, and then make his motion for new trial within a year of the decision of this Court.

For the foregoing reasons this Court is respectfully urged to reconsider the jurisdictional question here raised, and hold that there was no jurisdiction in the district court to hear Sakraida's Rule 60(b)(2) motion.

2. Sakraida failed to meet the requirements for granting a new trial based on newly discovered evidence

The requirements for granting a new trial are:

(1) the evidence must be discovered after the trial;

(2) facts must be alleged from which the court may infer diligence on the part of the movant to discover the new evidence;

(3) the evidence must not be just cumulative or impeaching;

(4) the evidence must be material;

[20] 7 Moore's Federal Practice, 2 Ed., ¶ 60.28[2], p. 400, footnote 37.

(5) the evidence must be such that a new trial would probably produce a new result.[21]

A motion for a new trial based on newly discovered evidence is an extraordinary motion, and in order for a district court to grant such a motion, the moving party must strictly comply with all of the requirements of such a motion.[22]

Because more than ten days had elapsed since the entry of the judgment of the district court, the Court of Appeals in its remand order treated Sakraida's motion as the equivalent of a motion under Rule 60(b)(2) rather than a motion for new trial under Rule 59. Professor Moore in his treatise discusses the relationship between Rules 59 and 60, and points out that the moving party under Rule 60 has the heavier burden than under Rule 59.[23]

If any of the Rule 60(b)(2) requirements set forth above are not met the motion should be denied. Sakraida failed completely to meet the threshold requirements (1) that the evidence must be discovered after the trial and (2) to allege facts from which the court could infer diligence on the part of Sakraida to discover the new evidence. Sakraida's explanation is that the evidence was discovered as a result of a "by chance" meeting between Messrs. Sakraida and Meyer

[21] *Giordano* v. *McCartney*, 385 F.2d 154 (3 Cir. 1967); *Ledet* v. *United States*, 297 F.2d 737, 739 (5 Cir. 1962); *Kithcart* v. *Metropolitan Life Ins. Co.*, 119 F.2d 497, 500 (8 Cir. 1941), cert. den. 315 U.S. 808; *McCullough Tool Company* v. *Wells Surveys, Inc.*, 343 F.2d 381, 410 (10 Cir. 1965), cert. den. 383 U.S. 933.

[22] *Strauss* v. *United States*, supra, at 854.

[23] 7 Moore's, supra, ¶ 60.23[3], [4], pp. 271, 273.

in Florida in January 1973. Sakraida's brief boldly states that the district court's finding of diligence was clearly supported by the evidence (Pet. Br. 51). The "by chance" meeting is not such evidence. All the evidence established that Sakraida displayed a minimum of effort to obtain the new evidence until after the Court of Appeals' decision upholding validity of the patent, 474 F.2d 167. Further, Sakraida's brief fails to cite a single authority which supports grant of a Rule 60(b)(2) motion under circumstances like the present (Pet. Br. 48-52). We shall now examine the "newly discovered evidence" and the circumstances surrounding its acquisition by Sakraida.

3. The "newly discovered evidence" was discovered before trial

The first requirement for granting a Rule 60(b)(2) motion is that the evidence must be discovered after the trial. The principal evidence relied upon by Sakraida is the testimony of Mr. Herbert Meyer concerning the flushing system at the Mission Dairy. Also, most importantly, Mr. Meyer was the key to Sakraida's obtaining the testimony of Messrs. Souza, Rovie and Whitmore (A. 192, 256-57).

It should be remembered that the Mission Dairy, according to Mr. Meyer, was not in operation until October 25, 1963 (A. 253) which is too late to act as a reference against the patent. Gribble and Bennett had been operating a pilot model of the patented in-

vention in 1962 and made the first sale of the patented invention in the Spring of 1963 (A. 60-61).[24]

In October, 1969, about two years before trial, Sakraida and his attorney were in touch with an agricultural expert, Mr. Fairbank, who was cooperating with Sakraida in providing his attorney with information which might invalidate the Gribble and Bennett patent (A. 182-84). In support of Sakraida's motion for summary judgment (A. 25), Mr. Fairbank executed an affidavit on October 13, 1969 (A. 34-36). At the time of preparing that affidavit, Mr. Fairbank was aware of the manure flushing system at the Mission Dairy which he considered to be like the Gribble and Bennett patent. Prior to execution of his affidavit of October 13, 1969, Mr. Fairbank specifically mentioned to Sakraida's attorney the existence of the Mission Dairy and its possible pertinency, which was acknowledged by Sakraida's attorney (A. 142-143, 150-151, 153-154, 171-172).

Mr. Sakraida testified that Mr. Fairbank was his sole source of information concerning possible prior art dairies and that he considered the information

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[24] Ag Pro admits that there was a striking similarity between the Mission Dairy and the Gribble and Bennett pilot model, Sweet's Dairy at Sixes, Oregon. This is not too surprising because the Sweet Dairy at Sixes, Oregon is close to the California border, and had been operated on an experimental basis since 1962. Furthermore, the Ross Holm Company was a common supplier of milking parlor equipment to the Sweet Dairy and to the Mission Dairy. Mr. Meyer said he had a meeting with Mr. Holm in December of 1961 in which he went over the equipment to be installed at the Mission Dairy (A. 252) and in March of 1962, Mr. Meyer testified that he learned from Mr. Holm that the manure flushing system he intended to install at the Mission Dairy was similar to that at the Sweet Dairy (A. 258-59).

from Mr. Fairbank concerning the Mission Dairy to be important (A. 180, 184-185). Sakraida requested his friend Mr. Wisdom to visit the Mission Dairy and find out about its manure flushing system (A. 177). Mr. Wisdom testified that he went to the Mission Dairy, but was denied access by the manager, Mr. Ripley, and that he made no further effort to find out anything about the flushing system at the Mission Dairy even though he was an employee of the Ross Holm Company which had installed equipment at that dairy (A. 196-197).[25]

It is difficult to believe that there was any *bona fide* refusal to permit Mr. Wisdom at least to inspect the manure flushing system at the Mission Dairy. Mr. Wisdom testified that he had previously visited the Mission Dairy, probably in 1965 when it had an open

[25] The testimony of Mr. Sakraida and Mr. Wisdom is that Wisdom's visit to Mission Dairy was in 1971. This is undoubtedly an error. That visit was made either in late 1969 or at the beginning of 1970 because Mr. Sakraida testified that he didn't do anything about getting additional information concerning the Mission Dairy after Mr. Wisdom told him that he had been denied access because "In the meantime we [Sakraida] had this summary judgment" in his favor (A. 188). At the hearing on summary judgment before the district court on December 22, 1969, the court indicated that it would grant the motion, which had been argued by Ag Pro's local counsel in El Paso. At his request the court did not finally grant the motion but agreed to an additional hearing which was attended by Ag Pro's trial counsel on February 11, 1970 and the motion for summary judgment was granted on February 19, 1970 (A. 3). Therefore, when Mr. Sakraida testified that he had a summary judgment in his favor "in the meantime" it must have been around the end of 1969 or beginning of 1970 that Mr. Wisdom visited the Mission Dairy. That is the logical time that Mr. Wisdom would have gone to the Mission Dairy because Mr. Fairbank testified that he told Mr. Sakriada and his attorney about the dairy in October 1969.

house, but that he didn't recall anything about an automatic flushing system (A. 198-199). Mr. Fairbank frequently visited the Mission Dairy in the mid-1960's (A. 172). He was never refused admission to the dairy and the dairy was operated as a show place which proudly displayed any innovations it had (A. 144-145). The owner of the Mission Dairy, Mr. Meyer, testified that the dairy was always open for anyone to inspect and that the only restriction that he placed on the manager, Mr. Ripley, was not to discuss dates in connection with the operation (A. 262).

The evidence clearly established that Sakraida and his attorney knew of the Mission Dairy prior to trial and it was not discovered after trial. The Mission Dairy, Mr. Meyer and all the other "new evidence" were available to Sakraida prior to trial.

4. Sakraida failed to establish any facts from which the court could infer diligence

The second requirement for granting a new trial pursuant to Rule 60(b)(2) is that the moving party has the burden of establishing facts from which the court may infer diligence on his part in discovering the new evidence. Not only is the record bare of any such facts, but the actions of Sakraida and his attorney establish the opposite of diligence. It was not until after the Court of Appeals reversed the judgment of the district court and upheld validity of the Gribble and Bennett patent (474 F.2d 167) that Sakraida did anything about trying to establish the evidence which is now claimed to be "newly discovered."

Sakraida then obtained the quick and complete cooperation of Mr. Meyer who was not only the source of the information concerning his Mission Dairy, but also concerning the alleged Souza, Rovie and Whitmore installations.

The district court's order of February 7, 1974 states that Sakraida ". . . did in fact exercise the due diligence required under Rule 60(b)(2) . . . and that such evidence was not available to the defendant in spite of the diligence exercised during the initial discovery of this cause" (A. 175). Not only is there a complete absence of any evidence to support this finding but it is contrary to all the evidence that was before the court. Sakraida and his attorney had been alerted by Mr. Fairbank during the initial discovery phase of the case as to the pertinency of the manure flushing system at the Mission Dairy. All that they did was to ask a friend in the vicinity of the Mission Dairy to stop by and check it out. When he reported that the manager of the dairy had refused him entry, Sakraida and his attorney dropped the matter. Even if there was a *bona fide* refusal of access, there were any number of things Sakraida could have done to obtain all of the information that he needed concerning the Mission Dairy, not the least of which was to take the deposition of the owner of the dairy, Mr. Meyer. There was an intervening period of almost two years between October, 1969 and trial in September, 1971 during which all of the "newly discovered evidence" could have been established. In this connection it should be kept in mind that in 1974, Mr. Meyer vol-

untarily came to El Paso, Texas to testify concerning the construction of his dairy and said that as a result of his research in 1961 and 1962 he had all the information concerning the alleged flushing systems of Rovie, Souza and Whitmore (A. 247-251).

The reason that Sakraida exercised no diligence prior to the trial was because he determined that he didn't need the "newly discovered evidence" to win in the district court. Sakraida deliberately chose not to bring that evidence before the court until after his previously submitted evidence was found to be inadequate.

Sakraida's actions in failing to offer the "newly discovered evidence" at the trial in 1971 is contrary to Rule 60(b)(2) and the controlling law.[26]

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[26] In *Philippine National Bank* v. *Kennedy*, 295 F.2d 544, 545 (D.C. Cir. 1961), the court said that a motion under Rule 60(b)(2) should be denied where a party fails to sustain his burden of showing "that the evidence was not and could not by due diligence have been discovered in time to produce it at trial."

Krock v. *Electric Motor & Repair Company*, 339 F.2d 73, 74 (1 Cir. 1964) held that a motion under Rule 60(b)(2) should be denied for lack of diligence where a party failed to avail himself of the discovery procedures to establish before trial evidence which is now claimed to be newly discovered.

In *Greenspahn* v. *Joseph E. Seagram & Sons*, 186 F.2d 616, 619 (2 Cir. 1951), the court said that where facts are in the possession of a party that should lead him to investigate in order to turn up evidence, failure by him to investigate is the opposite of due diligence.

Even where the later offered testimony of a witness might contradict the proof at a trial and establish fraud, a party's knowledge of the existence of that witness and his failure to call him as a witness or to take his deposition shows lack of diligence and a motion for a new trial should be denied. *Stiers* v. *Martin*, 277 F.2d 737 (4 Cir. 1960)

Even if Sakraida's "newly discovered evidence" completely anticipated the Gribble and Bennett patent, it was improperly received in evidence by the district court. Sakraida never crossed the threshold of establishing that it was in fact newly discovered and that it could not have been discovered by due diligence. At the commencement of the hearing on February 6, 1974 Ag Pro's counsel requested the court first to go into the question of whether Sakraida should be given the opportunity of putting on the newly discovered evidence. The court decided to receive all of Sakraida's evidence and then rule on it. The following took place, (Supp. A. 8-9):

"THE COURT:

Okay. That's your answer. Reserving the right for them to look at the memorandum, you may proceed now to put on your newly discovered - -

MR. KOLISCH:

Your Honor, would you hear us first on the question as to whether or not they should be given the opportunity to put on the newly discovered evidence; they should be - -

THE COURT:

If I understand the Fifth Circuit's direction to me, that's why we are here.

MR. KOLISCH:

As I understand the Fifth Circuit's direction was to hear whether or not there should be a hearing on the so-called newly discovered evidence.

THE COURT:

Well, wouldn't it be just as easy or quick to hear the whole matter now and I'll rule on all of it at the conclusion of the evidence."

Counsel insisted that before getting to the evidence, Sakraida had to establish that it was in fact newly discovered. The court said that the burden was on Sakraida to prove that the evidence was newly discovered and that he could proceed (Supp. A. 8-10).

It is established in patent cases that even where there is an anticipating prior patent which a defendant didn't know about but could have found by a diligent search of the records in the Patent Office, a motion to consider the newly discovered reference pursuant to Rule 60(b)(2) should be denied. In *Valmont Industries, Inc.* v. *Enresco, Inc.*, 446 F.2d 1193 (10 Cir. 1971), cert. den. 405 U.S. 922, plaintiff had prevailed in a patent infringement suit in the district court. While the case was on appeal, the parties entered into a settlement agreement whereby defendant was to make payments to plaintiff over a two-year period and the appeal was dismissed. A few months after the settlement, defendant discovered a German patent that invalidated plaintiff's patent and defendant then moved pursuant to Rule 60(b)(2) for a new trial based on newly discovered evidence. There was no question as to the invalidating effect of the German patent, and that the existence of the patent was unknown to defendant until after the settlement. The motion was denied on the sole ground that defendant failed to show that its failure to discover the new evidence prior to trial was not due to its lack of diligence. The Court said that a diligent patent search would have turned up the German patent and even though defendant had made a search of the Patent Of-

fice records prior to trial, his failure to find the patent showed lack of due diligence.[27]

It was certainly far easier and would have required much less diligence on the part of Sakraida to have obtained full information concerning all of the now alleged prior art via the Mission Dairy, about which he and his attorney had been aware since 1969, than it was for the defendant in the *Valmont* case to locate a foreign patent, of which he was unaware, among the twenty million technical documents on file in the United States Patent Office.[28]

5. The evidence concerning the Mission Dairy would not change the outcome of the case

Accepting Mr. Meyer's testimony that the Mission Dairy with the automatic manure flush system was completed and began operation on October 25, 1963, it was too late to invalidate the Gribble and Bennett patent. The Gribble and Bennett patent application was filed in the Patent Office on November 5, 1963, but the uncontradicted testimony is that in 1962, Gribble and Bennett had an experimental model of their invention at the Sweet Dairy and the first sale of the patented system was in the Spring of 1963 to Pineyhill — West Dairy (A. 60-61).

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[27] See also *Hemphill Company* v. *Holeproof Hosiery Company*, 143 F. Supp. 727, 732 (D.C. N.D. Ga. 1956).

[28] C. Marshall Dann, Commissioner of Patents and Trademarks speech before Wichita Manufacturers Association, reported 254 BNA's Patent, Trademark and Copyright Journal 15, 16 (Nov. 20, 1975).

It has long been the law that where a prior use is relied upon to anticipate a patent, the effective date of the prior use is when it was completed and fully operated in this country.[29]

The Mission Dairy fails to qualify under either subparagraphs (a) or (b) of 35 U.S.C. § 102 (Supp. A. 2-3) because it was not "known or used" before the date of the Gribble and Bennett invention nor was it "in public use or on sale in this country, more than one year prior to the date of the [Gribble and Bennett] application."

It is well established that an invention is not "known", "used", or "made" until it has been reduced to practice, which means that it must have been completely constructed, successfully operated and publicly known or used by others.[30]

The uncontradicted testimony is that the Gribble and Bennett invention was completed no later than early 1963, at least by the time of the sale of Pineyhill — West Dairy in the Spring of 1963 (A. 61), and that the Mission Dairy was not completed and operating until the end of October, 1963 (A. 253). The Mission Dairy is, therefore, not prior art as against the Gribble and Bennett patent.

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[29] *Coffin* v. *Ogden*, 85 U.S. (18 Wall) 821, 823 (1874).

[30] *Corona Cord Tire Co.* v. *Dovan Chemical Corp.*, 276 U.S. 358, 383 (1928); *Stearns* v. *Tinker & Rasor*, 220 F.2d 49, 56 (9 Cir. 1955), cert. den. 350 U.S. 830; *Stamicarbon, N.V.* v. *Escambia Chemical Corporation*, 300 F. Supp. 1209, 1216, (D.C.N.D. Fla. 1969), affd. 430 F.2d 920, cert. den. 400 U.S. 944.

6. The "newly discovered evidence" was improperly received in evidence

After the Court of Appeals' remand to the district court to hold a hearing on Sakraida's Rule 60(b)(2) motion, Ag Pro filed and served on August 23, 1973 (A. 5) a motion to produce pursuant to Rule 34 F.R. Civ.P. which *inter alia* requested:

> "3. All documentary evidence purportedly disclosing prior art pertinent to United States Letters Patent 3,223,070." (Supp. A. 6)

Sakraida refused for no valid reason to produce any of the requested documents. This refusal was upheld by Judge Guinn in an order dated December 7, 1973 (A. 5). After Judge Guinn recused himself and assigned the case to Judge John H. Wood, Jr., Ag Pro renewed its motion to produce pursuant to Rule 34 on December 18, 1973 (A. 6). Having heard nothing from the court by January 14, 1974 with respect to the renewed motion to produce and the case having been set down for hearing on February 6, 1974, Ag Pro's counsel wrote to Judge Wood requesting him to grant the motion and to order that the documents be made available to counsel at least two weeks prior to the forthcoming hearing on Sakraida's motion for a new trial. No response was received to counsel's letter of January 14, 1974 and at the commencement of the hearing on February 6, 1974, Ag Pro renewed its motion to produce which was denied and the court proceeded to receive in evidence all of Sakraida's "newly discovered evidence" (A. 6; Supp. A. 7-8).

It was fundamental and prejudicial error for the

district court to permit Sakraida to put in the "newly discovered evidence" without first making Sakraida satisfy the requirements of Rule 60(b)(2) that the evidence was (1) newly discovered, and (2) could not have been discovered prior to trial by the exercise of due diligence. Had the district court followed the procedure required under Rule 60(b)(2) it would have rejected the evidence and denied Sakraida's motion. Further, prejudicial error was committed against Ag Pro when it sought to put in rebuttal evidence. The Court informed Ag Pro's counsel that the evidence had been closed the previous day, which was contrary to counsel's understanding, and the court thereupon ruled in favor of Sakraida on the motion and the merits of the patent (A. 266-268).

There is an additional reason for rejecting all of the documents received in evidence in support of the "newly discovered evidence," and all of the testimony of Messrs. Rovie and Whitmore. Sakraida failed to give Ag Pro the thirty day notice concerning the "title, date, and page numbers of any publication to be relied upon as anticipation of the patent . . . [and the] name and address of any person who may be relied upon as the prior inventor or as having prior knowledge of or as having previously used or offered for sale the invention or the patent in suit. In the absence of such notice proof of the said matters may not be made at the trial except on such terms as the court requires", 35 U.S.C. § 282, (Supp. A. 4-5). Counsel for Ag Pro unsuccessfully objected to receipt of such evidence (A. 214):

"Yes, Your Honor. Apparently this is being offered as some kind of prior art. They — We are entitled to 30 days' notice under the statutes, 35 [U.S.C.] 284, and this is the first time that the address of this individual —"

The objection was repeated with respect to each of Sakraida's witnesses (A. 216, 217, 233), but the evidence was received and no terms were ever required from Sakraida. The error in receiving this evidence was further compounded by the court repeatedly stating that it was not going to pass on the merits of the patent (A. 215, 217, 245) and then passing on the merits without even giving Ag Pro an opportunity to rebut the improperly received evidence (A. 266-268).

Sakraida's failure to give Ag Pro the required statutory notice concerning its alleged anticipating evidence was deliberate and not an oversight. As previously discussed, prior to the hearing on the motion for new trial Sakraida successfully resisted Ag Pro's motion to produce the documents now relied upon as allegedly anticipating the Gribble and Bennett patent.

Finally, if Sakraida's "newly discovered evidence" has any probative value against the Gribble and Bennett patent, it is available for anyone, except Sakraida to use. It would do particular violence to the rule concerning finality of judgments to permit Sakraida to set aside a final judgment when he had knowledge of the evidence now principally relied upon for more than five years and deliberately chose not to bring it to the court's attention until he lost the case in the Court of Appeals. Anyone who is not bound by the

judgment in this case may use the "newly discovered evidence" for whatever it is worth.

Amicus Brief of Texas Farmers Union is Basically Unsound

The tone of The Texas Farmers Union brief sounds like the special pleading of someone more angered at the Patent Office and the patent system[31] than genuinely concerned with any of the issues in this case. That observation is reinforced by the brief's display of ignorance concerning at least two important and uncontradicted facts in this case, the license fee charged by Ag Pro and the date on which the Mission Dairy was completed and operating.

The Texas brief argues that it should be received and considered because the farmers should not be subjected to the ". . . expensive toll of this patent of obviously minimal technical merit. . . ." (Texas Br. 2). The patent in suit has never and will never exact any expensive toll from farmers. A modest one payment license fee from anyone wishing to practice the invention is all that Ag Pro has ever received for use of the patented invention (A. 62). That was noted by the Court of Appeals in its opinion, 474 F.2d at 169. Such payment is more than recovered within a brief period of time by users of the invention because of the tremendous savings in time, labor and equipment plus the vastly improved sanitary conditions in the barns of users of the invention.

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[31] We note the self citation as authority concerning those matters by the author of the brief (Texas Br. 7, fn. 5).

Another significant factual error in the brief of The Texas Farmers Union appears at page 27 under the argument that the Fifth Circuit improperly enforced Rule 60(b)(2) against Sakraida. The Texas brief states at page 27:

> "The petition also raises the propriety of the Fifth Circuit's reversal (Pet. 1a-6a) of the district court's grant of a new trial under Rule 60(b)(2) for consideration of alleged newly discovered evidence as to the existence at Mission Dairy in Carmel [sic, Gonzales], California, *more than one year before the filing of the Gribble and Bennett patent application*, of an identical dairy barn assemblage to that covered by the patent claims." (emphasis added)

The uncontradicted testimony is that the Mission Dairy was not in existence more than one year prior to the filing date of the Gribble and Bennett patent application. Mission Dairy did not come into existence until at least six months after the invention date of Gribble and Bennett.

The Texas brief argues (p. 28 et seq) that because of the toll on the public that would result from upholding validity of the patent, the district judge was free to interpret Rule 60(b) so as to receive in evidence the "newly discovered evidence" and invalidate the patent on it although that evidence clearly didn't meet the requirements of the rule. In the first place, as above mentioned, there has not and never will be any toll exacted from the public by the Gribble and Bennett patent. But more fundamentally we have never heard it argued, and the Texas brief fails to

cite a single authority in support of its novel proposition, that a federal rule of civil procedure is subject to varying interpretations and enforcement depending upon the type of case[32] and what a particular judge believes the effect on the public will be. According to this argument if the judge thinks the "outcome would have no consequential direct effect upon other members of the public," (p. 28) he should exclude evidence which is clearly not newly discovered. However, if the judge believes differently as to the effect on the public he should receive that evidence. Of course each federal judge may have a different idea as to the effect on the public of a particular patent and the Supreme Court will ultimately have to resolve in each case what the public effect of a patent will be to determine how to interpret a Rule 60(b) situation.

It follows from the argument in the Texas brief that any of the Federal Rules of Civil Procedure could be subjected to a different interpretation in patent litigation from other litigation.[33] We can hardly think of a more chaotic, unsatisfactory and possibly unconstitutional way of interpreting the Rules.

The public interest in patents which motivated this Court in such cases as *Motion Picture Patents*,[34] *Ma-*

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[32] Rule 1 F.R.Civ.P. provides that the rules govern the procedure in the district courts "in all suits of a civil nature."

[33] The courts have uniformly held that the Federal Rules of Civil Procedure such as Rule 52(a), are applied in patent cases in the same manner as they are in any other type of civil litigation, *Armour & Co.* v. *Wilson & Co.*, 274 F.2d 143, 156 (7 Cir. 1960).

[34] *Motion Picture Patents Co.* v. *Universal Film Mfg. Co.*, 243 U.S. 502 (1917).

sonite,[35] *Mercoid*,[36] *Lear*,[37] and *Blonder-Tongue*[38] to enunciate certain doctrines which placed limitations on patent holders who sought to abuse or otherwise improperly extend their patents is completely inapplicable to the present case. The Gribble and Bennett patent has never been used or enforced in a manner which could be considered inimical to the public interest. To the contrary the patent has always made available to all, for a single modest payment, a system that materially lowers the cost of producing milk and greatly assists in the control of pollution and the maintenance of sanitary conditions.

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[35] *United States* v. *Masonite Corp.*, 316 U.S. 265 (1942).
[36] *Mercoid Corp.* v. *Mid-Continent Invest. Co.*, 320 U.S. 661 (1944).
[37] *Lear* v. *Adkins*, 395 U.S. 653 (1969).
[38] *Blonder-Tongue Labs.* v. *University Foundation*, 402 U.S. 313 (1971).

CONCLUSION

The Gribble and Bennett patent added to our knowledge and produced a major advance in the dairy industry. It meets the basic constitutional test of promoting "the Progress of Science and useful Arts." It is a true combination patent which meets every statutory and decisional test of invention set forth by this Court. The patented combination provided a simple, inexpensive solution to an age old problem. The patent has been available to all members of the public on a most reasonable basis. The inventors were deservedly and properly issued a patent.

The decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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